No. 6436

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

JENNIE BLACKBURN, AS ADMINISTRATRIX OF THE ESTATE OF JOHN R. BLACKBURN, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

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STATEMENT OF THE CASE

This is the second appeal in this case, a former judgment for the plaintiff having been reversed by this honorable court in an opinion filed July 15, 1929. (33 Fed. (2d) 564.)

Plaintiff, appellee herein, instituted this action to recover on a contract of War Risk Term Insurance granted one John R. Blackburn by the defendant while in its military service during the World War.

In her petition (R. 1–3) plaintiff, after alleging the enlistment and discharge of the insured, and

the granting of the contract sued on, alleges in Paragraph IV (R. 2) that on October 5, 1918, while in defendant's service, the insured was gassed, as a result of which he became afflicted with stomach disorder, intestinal trouble, and pulmonary tuberculosis, by reason whereof he was totally and permanently disabled.

In Paragraph V of her petition plaintiff alleges that by reason of the foregoing the insured became entitled to receive from the Government the sum of $57.50 per month, commencing at the date of discharge and continuing until his death.

In its answer (R. 3–5) defendant, after admitting the enlistment, discharge, and granting of the contract sued on, denied that insured became permanently and totally disabled during the life of said contract, and as an affirmative defense defendant set up the lapse of the contract sued on by reason of nonpayment of premiums.

In her reply (R. 7) plaintiff denied defendant's affirmative defense.

This cause was tried to a jury. (R. 21.)

At the close of plaintiff's evidence (R. 33) the defendant moved the court for an involuntary nonsuit on the grounds that the evidence offered by the plaintiff failed to establish a prima facie case, which motion was by the court denied (R. 33).

At the close of the whole case (R. 39) the defendant moved for a directed verdict on the grounds stated in support of the motion for an involun-

tary nonsuit, which motion was by the court denied (R. 39).

Whereupon the cause was submitted to a jury, which returned its verdict for plaintiff. (R. 8.) Judgment was rendered on the verdict in behalf of plaintiff. (R. 8–10.) Defendant filed its motion for a new trial (R. 12) which motion was by the court overruled (R. 13). From the judgment in favor of plaintiff defendant has appealed. (R. 41.)

ASSIGNMENTS OF ERROR

I

The Court erred in denying the defendant's motion for a directed verdict, which motion was made at the close of the plaintiff's case, for the reason that the plaintiff did not prove permanent, total disability of John R. Blackburn during the time his policy was in effect and to which denial defendant took exception at the time of the interposition of said motion herein.

II

The District Court erred in denying defendant's petition for a new trial, which denial was excepted to by the defendant at the time of the interposition of said motion herein.

III

The District Court erred in entering judgment upon the verdict herein, as the evidence was insufficient to sustain the verdict or judgment.

IV

The District Court erred in denying defendant's motion for a directed verdict at the close of the entire testimony, which motion was interposed on the ground that John R. Blackburn had not been proven to have been permanently and totally disabled from following a gainful occupation in a substantially continuous manner during the time his policy was in effect.

V

That the Court erred in denying defendant's motion for a nonsuit at the close of the plaintiff's evidence, and renewed at the close of the entire case.

VI

That the Court erred in admitting in evidence plaintiff's Exhibits 1, 2, and 3, over objection of defendant, in that the admission of these exhibits deprived defendant of the right of cross-examination, and on the ground that they were self-serving declarations of plaintiff.

PERTINENT STATUTES AND REGULATIONS

Section 5 of the World War Veterans' Act as amended July 3, 1930, Public 522:

> The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this

Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact and law affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein. All officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training, or maintenance and support allowance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: *Provided,* That regulations relating to the nature and extent of the proofs and evidence shall pro-

vide that due regard shall be given to lay and other evidence not of a medical nature.

Section 13 of the War Risk Insurance Act (40 Stat. 555):

> That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and, for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: Provided, however, That payment to any attorney or agent for such assistance

as may be required in the preparation and execution of the necessary papers shall not exceed $3 in any one case: And provided further, That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the District Court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid.

Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard

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labor for not more than two years, or by both such fine and imprisonment.

Section 400 of the War Risk Insurance Act (40 Stat. 409):

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States upon application to the bureau and without medical examination shall grant insurance against the death or total permanent disability of any such person in any multiple of $500 and not less than $1,000 or more than $10,000 upon the payment of the premiums as hereinafter provided.

Section 402 of the War Risk Insurance Act (40 Stat. 615):

> That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall not be assignable and shall not be subject to the claims of creditors of the insured or of the beneficiary. It shall be payable only to a spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them.

TERMS AND CONDITIONS OF SOLDIERS' AND SAILORS' INSURANCE

I, William C. DeLanoy, Director of the Bureau of War Risk Insurance in the Treasury Department, pursuant to the provisions of section 402 of an act "to amend 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, hereby on this 15th day of October, 1917, by direction of the Secretary of the Treasury, determine upon and publish these full and exact terms and conditions of the contract of insurance to be made under and by virtue of the act:

1. Insurance will be issued for any of the following aggregate amounts upon any one life: * * * Which installments will be payable during the total and permanent disability of the insured, or if death occur without such disability for 240 months, or if death occur following such disability, for a sufficient number of months to make 240 in all, including months of disability already paid for in both cases except as otherwise provided.

2. The insurance is issued at monthly rates for the age (nearest birthday) of the insured when the insurance goes into effect, increasing annually upon the anniversary of the policy to the rate for an age one year higher, as per the following table of rates: * * *

Rates at ages higher or lower will be given on request.

The insurance may be continued at these increasing term rates during the war and for not longer than five years after the termination of the war, and may be continued thereafter without medical examination if the policy be converted into a form selected before the expiration of such five years by the insured from the forms of insurance which will be provided by the bureau, provided that premiums are paid therefor at net rates computed by the bureau according to the American Experience Table of Mortality and interest at 3½ per cent per annum.

3. That the insurance has been granted will be evidenced by a policy or policies issued by the bureau, which shall be in the following general form (which form may be changed by the bureau from time to time, provided that full and exact terms and conditions thereof shall not be altered thereby):

(T. D. 20 W. R.)

TOTAL DISABILITY

Regulation No. 11 relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent.

TREASURY DEPARTMENT,
BUREAU OF WAR RISK INSURANCE,
Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following regulation is issued relative

to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.

"Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments or insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

WILLIAM C. DELANOY,
Director.

Approved.

W. G. MCADOO,
Secretary of the Treasury.

ARGUMENT

POINT 1

The court erred in denying defendant's motion for a nonsuit and in denying defendant's motion for a directed verdict.

Treasury Decision Number 20, page 10 of this brief, which is a regulation promulgated under sanction of law and of which courts will take judicial notice, defines a permanent and total disability within the meaning of the contract herein sued on to be "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation * * * whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it." The courts have in the main approved this definition. Hence for plaintiff to be entitled to recover she must produce some substantial proof that the insured, John R. Blackburn, within the time alleged in her petition, namely, October 5, 1918, or within thirty-one days after November 1, 1918, had an impairment of mind or body which rendered it impossible for him to follow continuously any substantially gainful occupation and that such impairment of mind or body was founded upon conditions which rendered it reasonably certain that it would continue throughout his life.

The former judgment in this cause was reversed by this Honorable Court for the error of the learned trial court admitting in evidence the certificate of the coroner of Los Angeles County for the purpose of showing the cause of death.

In the opinion reversing the former judgment, 33 Fed. (2d) 564, l. c. 565, this court said:

> In view of a new trial, we need refer but briefly to the other assignment of error. While the testimony was ample to prove temporary total disability, no witness, professional or lay, testified as to the nature of the illness from which the deceased was suffering, or as to the cause of his disability. The jury was left wholly to speculation and guesswork on both of these questions. Furthermore, the record fully discloses the fact that more satisfactory testimony was within the reach of the appellee. The physician whom the deceased consulted six months after leaving the army was not called as a witness, nor was any reason assigned for not calling him. The same may be said of the failure to call any of the physicians who must necessarily have attended the deceased during his long confinement in the different hospitals. In short, the jury was left with little or nothing to guide them in determining the vital issues in the case. These deficiencies in the testimony can doubtless be supplied in some measure upon a retrial of the cause.

Therefore, one of the questions for determination in this appeal is whether on the retrial of this cause the plaintiff's proof overcomes the deficiency in the testimony at the former trial, pointed out in the opinion supra.

To meet the burden cast upon her, plaintiff called as witnesses at the retrial of her cause the following persons, who testified at the former trial, namely,

Jennie Blackburn, R. C. Polley, and Frank Renchey. If there is any material difference in the testimony of these witnesses given at the former trial and that given at the retrial, it is that their testimony at the retrial is not as favorable to plaintiff as that given at the former trial. However, the difference, if any, is too slight to warrant discussion.

In addition to the foregoing plaintiff produced as witnesses C. R. Christie, Dr. Elmer E. Lytle, and Roy B. Misener, none of whom testified at the former trial, and also introduced her Exhibits 1, 2, 3, and 4, which were not in evidence before.

The witness, Christie, was used solely to identify plaintiff's and defendant's exhibits.

The witness, Roy B. Misener, testified (R. 26, 27) that he saw deceased in bed after he (deceased) came back from the service. That deceased was in a run-down condition. That witness visited deceased many times and found him in bed most of the time.

On cross-examination (R. 27) this witness testified he never saw deceased do any work after discharge from the army, but that he understood that he, deceased, worked at the Wilson Mill a short time.

Dr. Elmer E. Lytle testified (R. 29, 30) that he is a physician and surgeon. That he treated John R. Blackburn, the last time being from May 1, 1925, until June 13, 1925. That he also treated him

when he was a child. That he found the deceased, John R. Blackburn, between May 1, 1925, and July 13, 1925, suffering from an advanced stage of tuberculosis—by advanced stage he means a later stage. That he could not tell just the number of years deceased had been suffering with tuberculosis, but it has existed over a rather long period of time. That he was totally and permanently disabled at the time witness examined him. That witness believes that deceased began to suffer with tuberculosis between the time he was gassed until the time he was first examined on July 19, 1921. That deceased was totally and permanently disabled if he was in the hospital.

On cross-examination (R. 30) this witness testified that if the deceased had active tuberculosis he should not follow any occupation. That witness should say deceased was totally and permanently disabled from following continuously any gainful occupation.

In answer to questions by the Court (R. 30, 31, 32) that witness further testified:

> The COURT. Not taking into consideration what followed, what would you say at that time how long had he been totally and permanently disabled?
>
> Answer. In my opinion, he should not work any time.
>
> The COURT. That don't answer it.
>
> Question. How long had he been totally and permanently disabled?

Answer. Well, from the time he first developed——

Question (interrupting). You said while ago, from the time he was gassed. How long would that be reasonably certain to continue in the future, from that diagnosis and what preceded?

Answer. Rest is one of the main requirements——

The COURT (interrupting). Answer the question, how long would it be reasonably certain to continue in the future?

Answer. If he needed rest, he should not work, that is all.

The COURT. How long would that condition be reasonably—the total and permanent condition—be reasonably certain to continue in the future?

Answer. Of course, that depends on so many things.

The COURT. You have everything before you. You have the hypothetical question before you—the conditions on down, his employment and relations and this diagnosis—you say from this diagnosis, he was permanently and totally disabled from the time of his discharge or from the time of being gassed—now, then, how long, based on the same hypothesis, would this total and permanent condition be reasonably certain to continue in the future, a year or two years or five years or life?

Answer. I know the results——

The COURT (interrupting). Not judging anything by the results.

Answer. Under the proper treatment——

The COURT (interrupting). Answer the question, if you want to tell us what you know; if you don't know, tell us and if you know, tell us.

Answer. Please ask the question again.

The COURT. You said, from what they asked you and the testimony as to the condition of the deceased from his discharge and this diagnosis, that on the 25th day of July, 1921, that you considered he was totally and permanently disabled from the date he was gassed in the army. Now, then, from the same hypothetical question and upon the same diagnosis, how long would you say the total and permanent disability condition would continue in the future?

Answer. If I remember——

The COURT (interrupting). Can you tell us?

Answer. No.

On redirect examination Doctor Lytle testified (R. 32) in answer to the:

Question. Doctor, I believe you testified he was totally and permanently disabled, was he, Doctor?

Answer. I said it probably developed between the time he was gassed until a diagnosis was first made.

On recross-examination this witness testified (R. 32, 33) that he is not a specialist in tuberculosis. That deceased's mother gave him the medical history at the time of the examination of deceased.

That the tuberculosis was not arrested when he examined the deceased in May, 1925. That he did not examine deceased at any time from September, 1919, until July, 1925. That he does not know the condition of deceased during the intervening time, that he may or may not have been working during that time. That he was the doctor for deceased's family. That he does not recall that deceased called upon him between the time he returned from service and the time he examined him in 1925. That he remembers seeing deceased, but did not examine him in a medical way.

Plaintiff's Exhibit 1 is a report of a medical examination made of deceased on July 25, 1921, as a result of which the following were made:

> Diagnosis: Tuberculosis, chronic pulmonary, rt. upper lobe, activity undetermined. 69—Adhesions of peritoneum, post operative.
>
> Prognosis: Guarded.

Plaintiff's Exhibit 2 is a report of a medical examination made of deceased on August 16, 1922, as a result of which the following were made:

> Diagnosis: Tuberculosis, chronic, pulmonary, moderately advanced, apparently arrested. Cicatrix of skin—appendectomy and drainage.
>
> Prognosis: Favorable.

Plaintiff's Exhibit 3 is a report of a medical examination made of deceased on January 15, 1924, as a result of which the following were made:

Diagnosis: Tuberculosis, pul. chr. advanced "B" active. Deviation of nasal septum.

Prognosis: Guarded.

Plaintiff's Exhibit 4 is a copy of Letters of Administration, as to which there is no dispute.

In the quoted part of the opinion, reversing the former judgment herein, we find the following statement: "The physician whom the deceased consulted six months after leaving the army was not called as a witness, nor was any reason assigned for not calling him." It is assumed that the physician whom the court had in mind, when making the statement just quoted, is the physician referred to by Russell Blackburn, a witness for plaintiff at the former trial. The testimony of this witness will be found on pages 29, 30, and 31 of the record in the former appeal. This witness testified, page 30 of that record: "We didn't know what was the matter with him. One time he got scared and went to a doctor. That was about six months after his discharge. It was prior to this time that he tried to work." In this connection may we impress upon the court that plaintiff did not see fit to recall this witness at the retrial of her cause and further that she again failed to use this physician as a witness and failed to assign any reason for not calling him, notwithstanding the admonition of this honorable court in this regard.

Defendant called as witnesses Doctors Arthur L. Barnes, Kirk Brown, A. C. Feaman, and Mr. C. E.

Wilson, all of whom testified at the former trial and who testified in substance as at the former trial.

In addition to the foregoing testimony, defendant put in evidence its Exhibit A–1, not offered at the former trial. This Exhibit is a report of a medical examination of deceased made March 31, 1920, as a result of which the following were made:

> Diagnosis: Conjunctivitis, chronic. Adhesions of peritoneum (following appendectomy).
>
> Prognosis: Good as to Conjunctivitis. Guarded as to Adhesions of peritoneum.

In the opinion, *supra,* this court said (l. c. 565):

> While the testimony was ample to prove temporary total disability, no witness, professional or lay, testified as to the nature of the illness from which the deceased was suffering, or as to the cause of his disability. The jury was left wholly to speculation and guesswork on both of these questions.

Therefore, let us see whether there was any substantial evidence adduced at the retrial, showing the illness from which the deceased was suffering or the cause of his disability, at a time while the contract sued on was in force.

In the case of *Owen Daten Nicolay* v. *United States,* decided by the Tenth Circuit Court of Appeals on June 30, 1931, the court said:

> Unless the plaintiff has produced some substantial proof that it was reasonably cer-

> tain, on or before May 2, 1919 (May 2, 1919, being the expiration date of the contract before the court)—Parenthesis ours—that his condition of total disability was one that would continue throughout his life, the case must be affirmed.

We think that the court in the *Nicolay case* announced the correct rule. Hence, for plaintiff in the case at bar to be entitled to recover she must have produced substantial proof showing that, during the life of the contract sued on, deceased not only had a total disability, but that it was then reasonably certain that it would continue throughout his life.

Plaintiff's witness Doctor Lytle did not see deceased until May 1, 1925, which was long after the lapse of the contract. While this witness testified that deceased was then suffering from an advanced stage of tuberculosis, he also testified that he could not tell the number of years he had been suffering therefrom. While, of course, it is not overlooked that this witness testified that he believed that deceased began to suffer with tuberculosis between the time he was gassed and the time he was first examined on July 19, 1921, there is no evidence in the record that deceased was gassed, or if gassed the date thereof. Therefore, this opinion of the witness is valueless in aiding plaintiff. This witness testified at some length both on direct, cross, redirect and recross examinations. However, it seems that the gist of his testimony is found in his

answer to the last two questions propounded by the trial court (R. 31, 32), namely:

> The COURT. You said, from what they asked you and the testimony as to the condition of the deceased from his discharge and this diagnosis, that on the 25th day of July, 1921, that you considered he was totally and permanently disabled from the date he was gassed in the army. Now, then, from the same hypothetical question and upon the same diagnosis, how long would you say the total and permanent disability condition would continue in the future?
>
> Answer. If I remember——
>
> The COURT (interrupting). Can you tell us?
>
> Answer. No.

From the answer quoted it is clear that this witness did not know and did not testify whether deceased had a permanent disability during the life of the contract in question.

It will be noted that Doctor Lytle testified that he believed deceased began to suffer with tuberculosis between the time he was gassed and the time he was first examined on July 19, 1921. In considering this testimony it must be borne in mind that deceased was not first examined in July, 1921, but was first examined on March 31, 1920. (See Defendant's Exhibit A–1), which examination shows that at that time deceased did not have tuberculosis. It is evident that this witness had not been advised of the examination made in March, 1920, but was

only advised of the examination shown by plaintiff's Exhibit 1, and that had he been aware of the fact that in 1920, deceased had no tuberculosis, it is assumed that his testimony in this regard would have been entirely different.

Plaintiff's Exhibit 1 is the report of a medical examination made of deceased in July, 1921, and while it shows that he had tuberculosis, it further shows that the activity was undetermined. It also shows that the prognosis was guarded. The diagnosis and prognosis speak for themselves and show that in the opinion of the doctor who made the examination that deceased did not have either a total or permanent disability.

Plaintiff's Exhibit 2 is a report of a medical examination made of deceased on August 16, 1922. This report also speaks for itself and shows that in the opinion of the doctor at that time, which is the material time, deceased's tuberculosis was arrested and conditions were favorable for his recovery. Certainly this is no evidence that at that time his disability was founded upon conditions which rendered it reasonably certain that it would continue throughout his life.

While plaintiff's Exhibit 3, a report of a medical examination made of deceased, shows that his tuberculosis was active and advanced, it also gives a guarded prognosis. However, in considering the value of this exhibit as evidence favorable to plaintiff, it must be borne in mind that this exam-

ination was made on July 15, 1924, long after the lapse of the contract.

However, the foregoing must be considered in the light of defendant's Exhibit A–1, which is a report of a medical examination of deceased made March 31, 1920, more nearly proximate to the life of the contract than any of the medical examinations put in evidence by plaintiff. This examination shows that deceased's lungs were negative, that is, that he at that time had no tuberculosis. The diagnosis made by the doctor making the examination is: Conjunctivitis, chronic. Adhesions of peritonium (following appendectomy) and the prognosis: Good as to conjunctivitis. Guarded as to adhesions of peritoneum.

Point 2

The trial court erred in denying defendant's petition for a new trial and in entering a judgment on the verdict.

For the reasons given in support of Point 1 of the argument the trial court should have granted defendant a new trial and should not have entered judgment on the verdict.

Point 3

The trial court erred in admitting in evidence plaintiff's Exhibits 1, 2, and 3.

As stated in the Argument on Point 1, these exhibits are reports of medical examinations made of deceased.

There was no testimony that the doctors who made these examinations were authorized to make same; that they were employees of the defendant at the time the examinations were made or otherwise; that the doctors were not available as witnesses or that the doctors whose names appeared as having made the examinations actually made them. Furthermore, these reports are hearsay in that they report simply what the doctor making them says he found upon examination of deceased and represent the conclusion and opinion of the doctor based on facts he says he found. Also these reports contain statements made by the deceased, which are clearly self-serving. In this connection it should be kept in mind that at the time the examinations were purported to have been made the deceased had applied to the defendant for compensation under the provisions of the then War Risk Insurance Act, and that the examinations, if made, for the defendant were for the purpose of determining whether deceased had any disability. Therefore, it was to the interest of the deceased that he have a disability and certainly any statements he made at such a time fall within the class of self-serving statements the same as any statement a person makes to a doctor who examines him for the purpose of testifying in his behalf, such statements being, the writers of this Brief understand, always excluded from evidence. Again by admitting these exhibits the defendant was denied its right of cross-examining the witnesses against it.

It is submitted that these reports were not admissible under the rule laid down in the cases of *Runkle et al.* v. *United States,* 42 Fed. (2d) 804, and *United States* v. *Cole,* 45 Fed. (2d) 339, and certainly their admission is in conflict with the rule laid down in the case of *United States* v. *James W. Wilson,* decided June 17, 1931, by the Fourth Circuit Court of Appeals.

In the *Cole case* (l. c. 341), the court said:

> There was no error in the admission of appellee's Exhibits "H" and "I." These exhibits consisted of two reports of physical examinations of appellee each dated April 30, 1923, and signed by physicians of the Bureau. Only those parts of the reports which gave specific findings of fact were permitted in evidence. The examinations were made under the authority of the Director (Tit. 38, ch. 10, Sec. 426, U. S. C.) and were taken from the Bureau's files pertaining to appellee. It is insisted that these reports are (1) confidential and (2) hearsay. We can not agree. They are not confidential or privileged when required to be produced in any suit or proceeding pending in the United States Court (Tit. 38, ch. 10, Sec. 456, Clause (b), U. S. C., *Gonzalez* v. *U. S.,* 298 Fed. 1003) and in fact no privilege was claimed for them in the lower court. Further, we regard these reports as exceptions to the hearsay rule. They were made by the examining physicians under the sanction of official duty and as and for a permanent record of

> specific facts to be kept in the files of the Bureau. * * *

It will be noted that in the *Cole case* only that part of the reports which gave specific findings of fact were permitted in evidence, while in the instant case the entire reports, including the statements of deceased, were admitted.

In the *Runkle case* (l. c. 806), the court said:

> The plaintiff offered in evidence a statement purporting to be signed by one Doctor Maguire, and purporting to be an examination of the insured made on December 4, 1919. The report discloses an active pulmonary tuberculosis; an inability to perform any part of any occupation; concludes that his chances for recovery or arrest are remote. The report recommends a rating for compensation of "Temporary Total." The report was found in the files of the attorney for the United States Veterans' Bureau for the State of Colorado. To this proffer of proof the defendant objected on the ground that the evidence was incompetent and immaterial, that the document had not been identified; and that it was hearsay.
>
> The identification was not sufficient and the report was properly excluded. Since the case is to go back for another trial, we pass upon the other objections. If the report is properly identified as having been made by a doctor employed by the United States government, and that it is his report of a physical examination made of the insured, it is not incompetent. * * *

> This statute contemplates that those claiming the benefits of the War Risk Insurance Act may have access to such reports. Such access would be of little avail to the claimants if the reports could not be used in court. Moreover, the statute contemplates use in court by subjecting them to the process of the United States court. Furthermore, the generous attitude of the government toward the beneficiaries of the Veterans' Act repels any idea of a desire to conceal any material fact from the veterans or their beneficiaries. Particularly is this true of findings of a physical examination. The standing of the doctors employed by the Government is assurance of the integrity of their reports. In *Gonzalez* v. *United States,* 298 F. 1003, the district court required the government to produce for the examination of the plaintiff in a war risk insurance case, such reports and records. In *Evanston* v. *Gunn*, 99 U. S. 660, the Supreme Court held that the records of meteorological stations were admissible in evidence, such reports being of a public character, and made in pursuance of public duty. To the same effect see *M'Inerney* v. *United States* (1 C. C. A.) 143 F. 729. It is our conclusion that as far as material to the issues, the report of Doctor Maguire, if properly identified, is admissible.

It will be noted that the court in the *Runkle case* required that reports of the character of plaintiff's Exhibits should be properly identified. Further-

more, in view of the use of the language, "Particularly is this true of findings of a physical examination," and the language, "It is our conclusion that as far as material to the issues, the report of Doctor Maguire, if properly identified, is admissible," found in the opinion, *supra,* it is to be inferred that the court had in mind that only the physical findings of the doctor were admissible.

In the *Wilson case* (Not reported) the court said:

> Two main questions are raised by the appellant in its assignments of error; FIRST, that the court erred in admitting certain reports of physical examinations made of the plaintiff, which were contained in the files of the United States Veterans' Bureau; SECOND, that the court erred in not directing a verdict for the defendant.
>
> The reports in question, to the admission of which objection was made, were reports of physicians to the Veterans' Bureau, and contained, among other things, certain statements of plaintiff himself, made during the examination. In *United States of America* v. *Wescoat*, decided by this court, April 13, 1931, Judge Parker exhaustively discusses the question of the admission of evidence of this character, and this court held that the evidence in that case was admissible, because it constituted the "best evidence possibly obtainable," but, in the *Wescoat case,* there was no question of the admission of anything other than the certificate of the physicians,

and the field hospital tags were entries made by the field hospital physicians in the ordinary course of professional duty. The physicians themselves were not available as witnesses, and the tags constituted the best evidence as to the findings of the physicians. In this case there is no showing that the physicians making the reports could not have been obtained as witnesses, and the judge admitted the entire report, including what may well be termed self-serving declarations, made by plaintiff at the time of the various examinations.

The cases of *Runkle et al.* v. *United States,* 42 Fed. (2) 804, and *United States* v. *Cole,* 45 Fed. (2) 339, relied upon by attorneys for the plaintiff, are easily distinguished from the instant case, and assuming without deciding that the reports in those cases were properly admitted, these decisions are not controlling here. The admission of the records as they were here admitted is, in our opinion, reversible error.

For the foregoing reasons it is respectfully submitted that the judgment herein should be reversed.

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